IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-343

TRAP ROCK INDUSTRIES, INC.,

Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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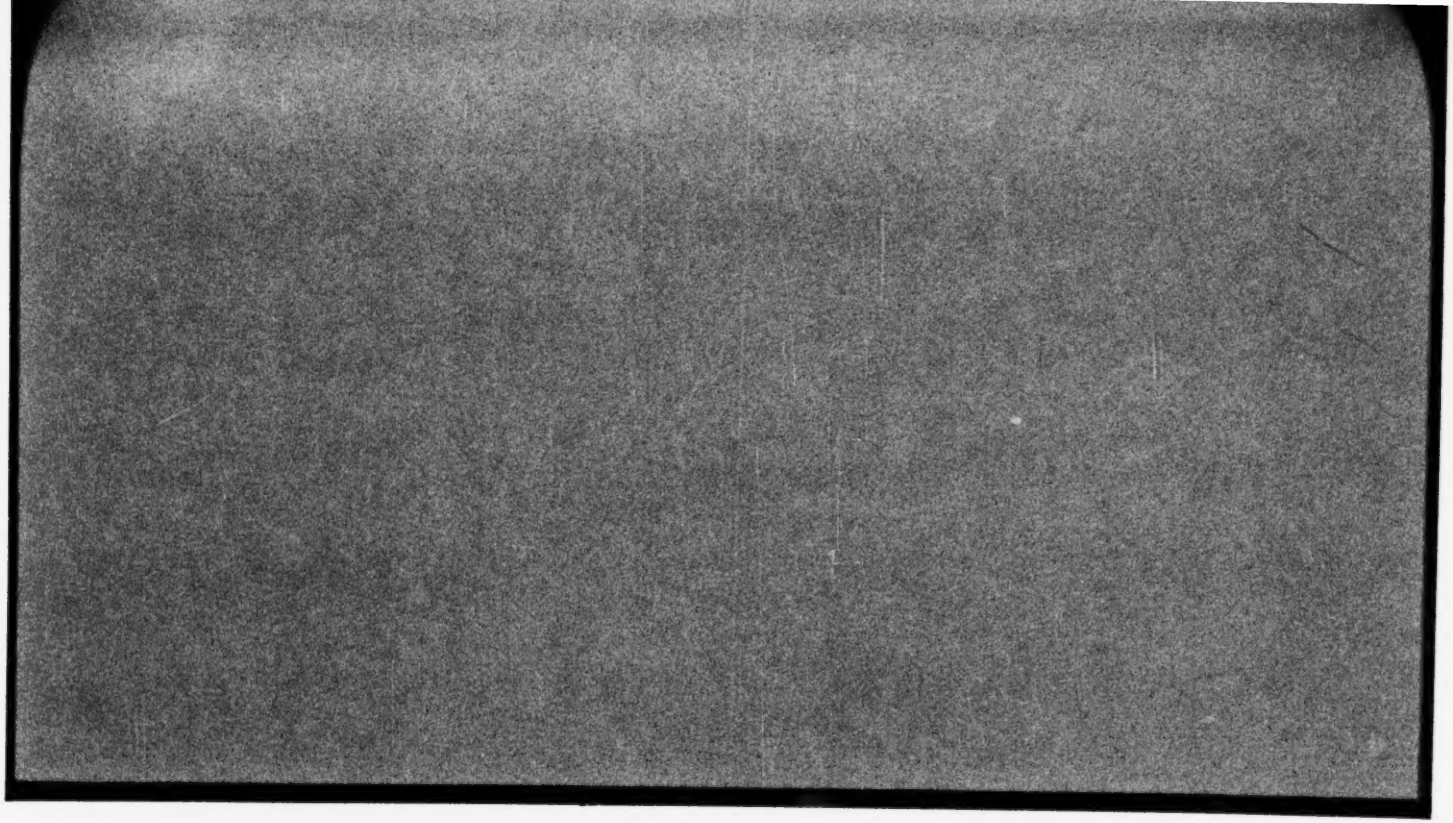

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS INVOLVED	1
COUNTER-STATEMENT OF CASE	2
ARGUMENT:	
Point I—The petition for writ of certiorari to review the affirmance by the Supreme Court of New Jersey of the debarment for five years of the petitioner from doing business with the State Department of Transportation should be denied due to mootness, because the petitioner has subsequently been reinstated and is once again doing business with the State	4
Point II—The petition for writ of certiorari should be denied as to the petitioner's due process claims, because this Court has already declined to review an earlier decision of the Supreme Court of New Jersey confirming the Commissioner of Transportation's authority to refuse to do business with contractors lacking the requisite moral responsibility	6
Point III—The petition for writ of certiorari must be denied as to the petitioner's equal protection claims because the argument was not reasonably raised in accordance with the requirements of State law	9
CONCLUSION	11

PAGE

Cases Cited

Edelman v. People of State of California, 344 U. S. 357 (1953) 10

Gonzalez v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964) 7

Johnson v. State of New Jersey, 384 U. S. 719 (1966) 10

Local No. 8-6 v. Missouri, 361 U. S. 363 (1960) 5

Morley v. Wilson, 261 Mass. 269, 159 N. E. 41 (Sup. Jud. Ct. 1927), cert. den. 276 U. S. 625 (1928) 10

Newman v. United States, 382 F. 2d 479 (D. C. Cir. 1967) 10

Peek v. Mitchell, 419 F. 2d 575 (6th Cir. 1970) 10

Trap Rock Industries, Inc. v. Kohl, 59 N. J. 471 (1971), cert. den. 405 U. S. 1065 (1972) 6-9

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Counter-Statement of Questions Involved

1. Should the petition for writ of certiorari, seeking review of the debarment for five years of the petitioner from doing business with the New Jersey Department of Transportation, be denied due to mootness because the petitioner has subsequently been reinstated and is once again doing business with the State?

2. Should the court consider the petitioner's claims that its debarment for five years violates due process requirements when the court has already declined to review an earlier decision of the Supreme Court of New Jersey on this identical issue?

3. Should the court consider the petitioner's claims that its debarment for five years violates petitioner's rights to equal protection of the laws when the question was not raised in accordance with the reasonable requirements of State law?

Counter-Statement of Case

On March 17, 1971, a New Jersey State Grand Jury returned an indictment charging Michael J. Stavola with attempting to bribe a State Trooper to fix criminal charges pending against Stavola, and for obstructing justice. On March 29, 1971, the petitioner Trap Rock Industries, Inc. (hereinafter "Trap Rock"), was notified that the indictment of Stavola, the principal of the corporation (80% stockholder, Chairman of the Board of Directors and President), was deemed by the Commissioner of Transportation to be a development affecting the responsibility of Trap Rock as a bidder on public works contracts with the State.

As a result of a hearing held before the Commissioner, at which Trap Rock was given the opportunity to present information to substantiate its classification as a qualified bidder, the Commissioner issued a decision on May 7, 1971, suspending Trap Rock from bidding on State contracts (See Appendix "D"). On November 23, 1971, the Supreme Court of New Jersey affirmed the action of the Commissioner (See Appendix "F"), and this Court de-

nied Trap Rock's petition for writ of certiorari, 405 U.S. 1065 (1972).

Meanwhile, on November 22, 1971, Stavola was convicted in Monmouth County Court of the crimes of bribery and obstructing justice. Stavola was sentenced on January 21, 1972 to a term of not less than one year nor more than two years. This conviction necessitated that a hearing be held to gather information regarding the State's ongoing business relations with Michael J. Stavola and any business entity with which he was associated.

At this February 15, 1972 hearing, petitioner was expressly advised that the Commissioner of Transportation was considering extending the scope of the debarment to county and municipal bodies utilizing State funds and to the supplying of materials. On March 16, 1972, the Commissioner of Transportation entered an order debarring petitioner:

> ". . . from bidding on any contracts with the Department of Transportation or any contract with county or municipal bodies which utilize or propose to utilize State funds, subcontracting on such contracts or providing materials for such contracts, for a period of five years to run from May 7, 1971 . . ." (See Appendix "C").

On July 5, 1972, the Appellate Division affirmed so much of the Commissioner's order which debarred petitioner from bidding on any contract with the Department and from supplying materials to contractors performing State contracts. However, the court reversed the Commissioner's order insofar as it debarred petitioner from participating in municipal and county work (See Appendix "B"). On May 7, 1973, the Supreme Court of New Jersey unanimously reversed that part of the Appellate

Division's judgment limiting the authority of the Commissioner of Transportation, thus reinstating in its entirety the Commissioner's debarment order (See Appendix "A").

In June of 1973, Michael J. Stavola sold all of his interest in the petitioner Trap Rock to his two sons. As a result of this divestiture, the Commissioner of Transportation ordered on June 29, 1973, that petitioner be reinstated as a prequalified contractor and Trap Rock is presently in good standing with the Department of Transportation (See Appendix "G").

ARGUMENT

POINT I

The petition for writ of certiorari to review the affirmance by the Supreme Court of New Jersey of the debarment for five years of the petitioner from doing business with the State Department of Transportation should be denied due to mootness, because the petitioner has subsequently been reinstated and is once again doing business with the State.

The issue which the petitioner seeks to bring before this Court is whether the New Jersey Commissioner of Transportation improperly debarred it from bidding on contracts to be awarded or funded by the Department of Transportation. However, the issue of the petitioner's debarment is now moot since, subsequent to the decision of the Supreme Court of New Jersey which is sought to be reviewed, the Commissioner of Transportation reinstated petitioner as a prequalified contractor, and petitioner is presently in good standing with the Department of Transportation.

An excellent illustration of this Court's refusal to give opinions upon moot questions may be found in *Local No. 8-6* v. *Missouri*, 361 U. S. 363 (1960). In that case, a labor union had appealed from a judgment of the Supreme Court of Missouri affirming a decree which enjoined the union from continuing a strike against a public utility. During the litigation the strike ended, and the injunction expired by its own terms. This Court held that the controversy was moot, stating that:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain. *Brownlow* v. *Schwartz*, 261 U.S. 216, 217, 218 . . ." 361 U. S. at 371.

Similarly, an affirmance or a reversal in the present case would also be meaningless, since the debarment in question has been terminated and petitioner has been reinstated. This Court can only order the Commissioner to reinstate petitioner, which has already been done. This Court certainly cannot order the new owners of the petitioner to sell back the company to Michael J. Stavola. Therefore the petition for writ of certiorari should be denied due to mootness.

POINT II

The petition for writ of certiorari should be denied as to the petitioner's due process claims, because this Court has already declined to review an earlier decision of the Supreme Court of New Jersey confirming the Commissioner of Transportation's authority to refuse to do business with contractors lacking the requisite moral responsibility.

Petitioner is once again before this Court arguing that its debarment violates due process requirements due to the absence of any statutory or regulatory standards setting forth the Commissioner of Transportation's authority to debar and the conduct proscribed (PS). Two years ago the Supreme Court of New Jersey expressly stated that the Commissioner of Transportation is not mandated by statute or due process requirements to specify in rules the factual patterns which spell out when a contractor will be found to lack moral responsibility. *Trap Rock Industries, Inc.* v. *Kohl*, 59 N. J. 471, 483 (1971) (App. F-44a). This Court denied certiorari. 405 U. S. 1065 (1972). A comparison of pages 13 to 24 of petitioner's petition in the first *Trap Rock* case with pages 8 to 16 of the present petition demonstrates the identity of the argument.

Petitioner attempts to distinguish *Trap Rock* I from the present case on the ground that *Trap Rock* II concerns a debarment for five years while the first case concerns a suspension. However, no such distinction is made by the Supreme Court of New Jersey. At several points in its opinion in *Trap Rock* I (e.g. 59 N. J. at 487, 490; App. F-50a, 54a), the court carefully limited its holding to suspension proceedings as opposed to debarment proceedings. However, when discussing whether due process

required any statutory or regulatory standards, the court spoke in terms equally applicable to both suspension and debarment. 59 N. J. at 483 (App. F-45a). It is significant that the opinion of the Supreme Court of New Jersey which petitioner now seeks to have reviewed makes no mention of due process claims, or of the case of *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964), relied on so heavily by petitioner in support of its due process claims in both of its petitions for writ of certiorari. Thus it is clear that the Supreme Court of New Jersey in *Trap Rock* II considered that the due process claims of petitioner had been disposed of in *Trap Rock* I.

As for the merits of petitioner's due process claims, the thrust of its argument is that Trap Rock should not have been debarred because Michael Stavola was not on notice that if he bribed a State Trooper the Department of Transportation might refuse to do business with his company. It is settled that the legislative mandate that a bidder be "responsible" embraces moral integrity. *Trap Rock Industries, Inc.* v. *Kohl, supra* at 481 (App. F-43a). As noted by the Supreme Court of New Jersey, the subject of moral integrity defies a cataloguing of all conceivable factual patterns which reveal a moral deficiency. The court added that:

> ". . . no such detailed exposition is needed. Good moral character is demanded in sundry situations without a brochure upon the topic. The standard draws specificity from each setting. So here, the nature of the subject, i.e., doing business with the State as a supplier in its procurement program, itself supplies sufficient concreteness to the concept of moral integrity." *Trap Rock Industries, Inc.* v. *Kohl, supra* at 483 (App. F-45a to 46a).

Petitioners place undue reliance upon *Gonzalez* v. *Freeman, supra,* where it was held that the Federal Administrative Procedure Act required the agency to spell out the misdeeds which would entail debarment of a licensee to participate in certain transactions under the auspices of the Commodity Credit Corporation. The Supreme Court of New Jersey has already stated that *Gonzalez* is inapplicable to the present case. *Trap Rock Industries, Inc.* v. *Kohl, supra* at 484-485 (App. F-46a to 47a). Contrary to the petitioner's contention, the basis for the court's distinguishing of *Gonzalez* had nothing to do with the fact that *Gonzalez* was a debarment as opposed to a suspension case. The court noted that in *Gonzalez* the government was not being compelled to procure its needs from a morally unfit supplier, and that the debarment from reselling surplus commodities in other countries was based exclusively upon the doing of a specific act, the misuse of an inspection certificate. The court concluded that:

> "We do not read *Gonzalez* to mean that the moral responsibility which government demands of those who would like to supply its needs must be defined in terms of detailed acts or omissions, failing which government must accept a bidder, however lacking he may be in integrity. Indeed, *Gonzalez* found it implicit that dishonesty would justify debarment, 334 F. 2d at 576-577. It would seem incongruous to say that although honesty is so vital that it is an implied requisite, a lack of it will not be a bar unless an administrator states in advance what acts or omissions cannot be reconciled with that trait". 59 N. J. at 485 (App. F-47a to 48a).

Petitioner was not debarred until after a full hearing, and until its principal had been convicted of attempting

to bribe a State Trooper. At the hearing petitioner was given full opportunity to explain why the State should do business with it. Where is the need for specificity as to moral responsibility? Petitioner certainly cannot argue that Michael Stavola became morally irresponsible because no one defined the term for him. As stated by the Supreme Court of New Jersey:

> ". . . due process does not require that the State, in its role as a purchaser, must thus canalize the discretionary power of its agents to protect the public interest in this area, and indeed at the pain of being compelled to contract for its needs with a bidder who is unfit". *Trap Rock Industries, Inc.* v. *Kohl, supra* at 485-486 (App. F-48a).

POINT III

The petition for writ of certiorari must be denied as to the petitioner's equal protection claims because the argument was not reasonably raised in accordance with the requirements of State law.

The only federal constitutional issue argued before the Supreme Court of New Jersey in the present case was petitioner's claim that it had been denied the equal protection of the laws because the Commissioner of Transportation had not debarred another company which allegedly had paid bribes to a public official. The court disposed of this argument on the grounds that it had not been properly raised below:

> "The Appellate Division properly declined to accept the issue. To begin with, an equal protection issue is not generated merely by an assertion that someone else was dealt with differently. . . . We

> do not have the facts. All we have is a naked allegation that there are no relevant differences; with no charge that the Commissioner intended an invidious discrimination. In any event, *it is inappropriate to advance the constitutional issue by a petition for rehearing on appeal and in a proceeding to which the other alleged offender is not a party*". *Trap Rock Industries, Inc.* v. *Kohl*, 63 N. J. 1, 5 (1973) (App. A-5a). (emphasis added).

The Supreme Court of New Jersey's view of the equal protection issue brings into play the well-established doctrine of independent State grounds. *Edelman* v. *People of State of California*, 344 U. S. 357 (1953). There this Court stated that it was without power to decide whether constitutional rights have been violated when the federal questions were not reasonably raised in accordance with the requirements of the State law. This Court held that non-compliance with such State law constitutes an adequate State ground for a decision below. See also, *Johnson* v. *State of New Jersey*, 384 U. S. 719, 735 (1966). Accordingly, the petition for writ of certiorari must be denied as to the petitioner's equal protection claims.

The State wishes to add that there are many relevant factual differences between the case of the petitioner and the other parties to whom he refers. However, even assuming that the facts of the cases were similar, it is clear that the government's decision to institute or not to institute legal proceedings (e.g., debarment action) is unreviewable for arbitrariness or abuse of discretion. *Newman* v. *United States*, 382 F. 2d 479 (D.C. Cir. 1967); *Peek* v. *Mitchell*, 419 F. 2d 575 (6th Cir. 1970); *Morley* v. *Wilson*, 261 Mass. 269, 159 N. E. 41 (Sup. Jud. Ct. 1927), *cert. den.* 276 U. S. 625 (1928).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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